United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Docket No. 76-7377

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL ROBINSON AND FACULTY ASSOCIATION OF ADIRONDACK COMMUNITY COLLEGE,

Plaintiff-Appellants,

vs.

HOMER P. DEARLOVE, CHAIRMAN, MERRITT E. SCOVILLE, DURWARD D. WEAVER, JOHN GOETZ, LESLIE BRISTOL, JOHN J. CASTLE, JACQUES GRUNBLATT, J. WALTER JUCKETT, and JOSEPH RANDLES, as the Board of Trustees of Adirondack Community College,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR APPELLANTS

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Section 1 [nor] shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

(b) How Presented. [If,] on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

QUESTIONS PRESENTED

1. Whether plaintiff's "continuing contract" of employment, under New York law and with reference to the circumstances surrounding his 13 years of employment at the College, is "property" which, if taken without due process safeguards, states a federal cause of action?

2. Whether the dissemination to prospective employers of information questioning plaintiff's physical and mental ability to teach without affording him an opportunity to present his own expert's medical opinion, sufficiently threatens his "liberty" as to state a federal cause of action?

3. On a motion to dismiss for failure to state a claim upon which relief can be granted, may a district court: (a) consider matters outside the pleading without notice and an opportunity to offer contradictory proof; (b) decide the motion under Fed.R.Civ.P. 12(b)(6) rather than Rule 56 when it considers matters outside the pleading?

4. Did the district court properly decide that due process was satisfied when: (a) the defendants, two years after plaintiff's termination still have not indicated whether Professor Robinson was fired for cause or involuntarily retired for health reasons; (b) Professor Robinson had no opportunity to confront and cross-examine witnesses; (c) Professor Robinson had no opportunity to call witnesses on his own behalf, including medical experts; (d) no oath was administered to any of the participants in the hearing.

NATURE OF THE CASE

This is an appeal from the United States District Court for the Northern District of New York. Plaintiff, Samuel Robinson, was a Professor of English and speech at the SUNY educational institution* under the defendant-Board of Trustees' supervision. He challenges the sufficiency of the procedures attending the recent termination of his "continuing contract" with the college under the Due Process Clause of the Fourteenth Amendment, having served the college as a full-time professor for 13 years. The termination procedures established in the Faculty Handbook and promulgated by the college are also challenged as being constitutionally deficient on their face (A. 8-10).** Jurisdiction is alleged under 28 U.S.C. §1343 (A. 4).

The defendants moved to dismiss plaintiff's complaint on two grounds; first, lack of subject matter jurisdiction [Fed.R.Civ.P. 12(b)(1)] in that the Board of Trustees of ACC (SUNY) do not act under color of state law; second, failure to state a claim upon which relief can be granted (Fed.R.Civ.P.

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* Adirondack Community College.

** Refers to pages of the Joint Appendix.

12(b)(6)] in that the termination conference concerning Professor Robinson was constitutionally sufficient under the Due Process Clause of the Fourteenth Amendment. (A. 15).

In support of the latter contention defendants attached to their motion papers a transcript of that conference for the district court's consideration. The defendants did not request that their 12(b)(6) motion be treated as one for summary judgment (A. 24).

PROCEEDINGS AND DISPOSITION BELOW

The motion was heard before Foley, J. on May 3 , 1976 in the Northern District of New York. Attorneys for both parties were present and submitted post-hearing letters of legal memoranda as requested by the district court (A.25-31). The attorney for plaintiff therein requested notice and an opportunity for submitting additional proof as to the sufficiency of any hearing given Professor Robinson if the district court contemplated treating the defendants' motion as one for summary judgment since exhibits were attached to defendant's motion papers (A.28) the district court did not respond to this request and no further papers, exhibits, etc. were submitted by either party for the district court's consideration.

In an opinion under date of June 29, 1976 (A. 32-41) Judge Foley granted the motion to dismiss upon the grounds plaintiff possessed no "liberty" or "property" interests protected by the Fourteenth Amendment and that in any event, as evidenced by the transcripts supplied by the defendants, the procedure followed in Professor Robinson's termination passed constitutional scrutiny. An order dismissing plaintiff's complaint having been entered, plaintiff instituted the instant appeal.

STATEMENT OF FACTS

ACC opened its doors in September of 1961. At that time Samuel Robinson, plaintiff-appellant herein, was a faculty member teaching both Speech and English courses. Throughout the entire course of his 13 year tenure at ACC Professor Robinson suffered from the familiar disease of diabetes (A. 71-72). Nevertheless, his employment with the college continued uninterrupted for over a decade; indeed, he was given a "continuing appointment" by the Board of Trustees of ACC (defendant-appellees). There is no dispute between the parties that for many years Professor Robinson was one of the finest, if not the most outstanding professor at ACC (A. 68).

But in 1972 Professor Robinson required hospitalization for his diabetic condition, and again in 1973, and late summer of 1974. Over this two year period some complaints concerning Professor Robinson's teaching methods were stated by students and faculty colleagues. On the other hand, some students complimented Professor Robinson and found his courses enlightening and instructive; other faculty colleagues refused to evaluate him since they had no first-hand knowledge of Professor Robinson's present teaching ability.

The underlying cause of the dispute appears to be Professor Robinson's diabetic condition and defendant's response pursuant to Article VIII, C and Article IX, D. After his hospitalization in the Summer of 1974, the college administration sought a medical opinion as to Professor Robinson's expectation of future good health. They received a report from the hospital physician then attending Professor Robinson which in part stated the Professor "had both confusion and memory loss <u>at this time</u>," and that the doctor expressed his "doubt" as to whether Professor Robinson could work again and that because the Professor lives alone "his prognosis is guarded" (A. 69). The official medical diagnosis was "brittle diabetes" (A. 69).

It was upon this sole medical opinion that the college administration decided to end Professor Robinson's tenure at the College. By letter dated August 20, 1974 Professor Robinson was informed that he was dismissed (no reasons were given) but that he could request a hearing anyway on the matter of his termination. The letter also thanked him for his 13 years of service to the college (A. 51).

Professor Robinson accepted the offer of a hearing and a conference with the Board of Trustees was subsequently scheduled for October 17, 1974 (A. 51-78).

The procedure employed was fairly simple; Doctor Eisenhart, President of the College and Doctor Hibbard, Dean of the College, recalled a number of complaints and incidents provoked by Professor Robinson's illness and presented the medical opinion of the physician treating Professor Robinson's recent illness. Uninformed as to the reason for his firing, Professor Robinson secured counsel from his bargaining representative, Associated Community College Faculties (ACCF). But no first-hand testimony by witnesses was requested by the Trustees and none of the complainants against Professor Robinson appeared at the hearing. Thus counsel for Professor Robinson merely questioned Doctors Eisenhart and Hibbard about what they had observed, remembered, said or had read concerning Professor

Robinson over the past two years. The record below is unclear as to whether the Professor was ever aware of or had the opportunity to call witnesses on his own behalf and to present opposing medical testimony (A. 75-77).

One week later the Trustees informed Professor Robinson by letter that they approved of his termination by President Eisenhart. No indication was given as to whether the determination was for "inadequate performance of duties, misconduct" etc. under Art. VIII, Title D, Personnel Policies (A. 48) or was a "retirement for physical or mental incapacity" under Article IX, Title D (A. 50).

After thirteen years of service to the College as its most outstanding professor (which, plaintiff argues, rises to the level of "property" and "liberty" under the Fourteenth Amendment) Samuel Robinson initiated this lawsuit only to compel the Trustees to accord him the process due a professor of such distinction and length of service, and to claim what is, at the very least, his right to know why and whether he was "fired" or "retired".

ARGUMENT

POINT I

PLAINTIFF'S COMPLAINT ALLEGES A DEPRIVATION OF BOTH "PROPERTY" AND "LIBERTY" WITHIN THE PROTECTION OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

A. As A Full-Time College Professor Employed By The Defendants For 13 Years, Plaintiff Did Not Serve At The Will And Pleasure Of The Board of Trustees. Instead, He Had A "Continuing Contract" With The Defendants Which, Under The Terms Of The Collective Labor Agreement, Was Terminable Only For Retirement, Retrenchment, Or Cause. A Termination Of His Services During The Life Of This Employment Contract Requires The Attendance Of Due Process Safeguards.

The lower court erred in dismissing the complaint upon the authority of Bishop v. Wood, U.S. , 96 S.Ct. 2074 (1976). In doing so it concluded that the allegations of the complaint "do not amount to a deprivation of liberty or property either in employment or reputation . . ." (A.40). Plaintiff contends this conclusion is erroneous because the district court misinterpreted Bishop v. Wood and consequently misapplied that holding to the facts herein.

Claims of deprivation of property are largely sui generis. Their resolution rests heavily upon state law and the surrounding circumstances which evidence the existence of rules, contracts or understandings that support a plaintiff's claim to

continued receipt of a governmental benefit. Bishop v. Wood, supra at 2077-78 & nn. 6-7. And, unless the law of New York with regard to tenured college professors is identical to the law of North Carolina with regard to recently hired policemen, Bishop v. Wood is only an indirect aid and certainly not conclusive as to the sufficiency of plaintiff's complaint. A comparison of the proprietal status of these forms of employment reveals the difference in their Fourteenth Amendment status.

The legal status of the discharged policeman in Bishop is best reflected in the district court's opinion which analyzes the relevant employment terms under North Carolina law. See Bishop v. Wood, 377 F.Supp. 501 (N.D.N.C. 1973). Noted the court:

> "There was no written contract of employment, nor was there any agreement as to the terms of such employment." (377 F.Supp. at 502).
>
> "[P]laintiff was given oral notice of and reasons for his discharge . . ." (Id. at 503).
>
> "Under the law in North Carolina, nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party irrespective of the quality of performance by the other party." (Id. at 504), (citations omitted).

A quick comparison between Professor Robinson's complaint and these facts upon which Bishop v. Wood was decided reveals an extensive difference that should also be reflected in the final outcome.

Professor Robinson is not a recently hired professor. He has been teaching at Adirondack Community College since September 12, 1961—the date of the school's inception (plaintiff's complaint ¶6 at A. 5-6). And, unlike Bishop, this plaintiff does have an employment contract setting forth the terms and conditions of his employment. Pursuant to a collective labor agreement between the college and Professor Robinson's bargaining agent (Associated Community Colleg Faculties), appointments of academic staff are for different durations and are terminable w ith or without reason contingent upon the nature of the appointment. Professor Robinson had a "continuing appointment",* which was to "terminate at the end of the academic year which falls within the fiscal year in which he reaches his 65th birthday."

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* Faculty Association-Trustees' Labor Agreement, Article X at A. 44-46.

Article VIII of the Handbook also deals with the termination of professorial services. It provides that only temporary appointments are terminable at will and that such appointments cease at the end of the specified term with no right to appeal a non-renewal.* The obvious intention of the Policies, then, is that continuing appointments are "expectancies of continued employment", Bishop, supra at 2077, with termination only for cause (Article VIII, Title D), retrenchment (Article VIII, Title E), or retirement (Article IX). See A. 46, 48-50; also see plaintiff's complaint, ¶7 at A. 6.

Undoubtedly, then, Professor Robinson had a sufficient expectancy of continued employment to constitute a Fourteenth Amendment property interest. He did not hold his position "at the will and pleasure" of his public employer. Bishop v. Wood, U.S. , 96 S.Ct. at 2078 & n.9. This was admitted by President Eisenhart (A. 53). The employment contract of Professor Robinson, unlike the ordinance in Bishop, supra at 2078, is not susceptible to an interpretation that employment is conditioned merely upon conformity with removal procedures in disregard of the cause for termination. Professor Robinson's employment contract gives him more than procedural rights. The Handbook and Agreement (A. 44-50), clearly aim toward creation of a continuing

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*Article VIII, Titles A-B at A. 47-48.

contract of employment and confer an assurance of continued employment terminable only for the above-mentioned reasons. The integrity of any such employment contract is guaranteed by the public policy of New York favoring collective labor agreements between public employers and their employees. N.Y. Civil Service Law § 200 et seq.; also see Board of Education v. Associated Teachers of Huntington, 30 N.Y.2d 122, 128-131 (331 N.Y.S.2d 17, 22-24, 282 N.E.2d 109) (1972).* Professor Robinson has a property interest subject to Fourteenth Amendment Due Process protection.

Furthermore, the lower court herein misread one of the holdings of Bishop v. Wood. Of the two issues presented for resolution, one was "whether petitioner's employment status was a property interest protected by the Due Process Clause of the Fourteenth Amendment," 96 S.Ct. at 2077.** The Court answered that question in the negative and never reached the issue of

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* N.Y. Civil Service Law §201(6)(iii) specifically includes the defendant-trustees as "public employers."

** The second issue presented in Bishop was "assuming that the explanation for his discharge was false, whether that false explanation deprived him of an interest in liberty protected by that clause." (96 S.Ct. at 2077).

what procedures are "due" when property interests protected by the Fourteenth Amendment are at stake. The Court merely affirmed the district court's determination that no property interest of a constitutional nature was present and that the dismissal procedures provided for by city ordinance were complied with. Id., at 2079. The district court's decision that the policeman's employment status was not property under the Fourteenth Amendment had sufficient basis to "foreclose our independent examination of the state law issue." U.S. , 96 S.Ct. at 2079. The district court herein failed to note this crucial factor; i.e., that the Supreme Court in Bishop never found that the employment status therein rose to the level of a property interest protected by the Fourteenth Amendment. Thus it was error for Judge Foley to write "the Supreme Court (in Bishop) essentially held that plaintiff's employment rights, protectable under the Fourteenth Amendment Due Process Clause, were co-extensive with the state law . . ." (A. 35). The Supreme Court in Bishop decided that only when employment rights do not rise to a property or liberty interest under the Fourteenth Amendment, are state removal procedures beyond Fourteenth Amendment scrutiny and no federal cause of action is presented—a very unremarkable holding. Id., text accompanying n.13 at 2080.

When an interest in employment becomes "property" through contract terms or its treatment under state law, it then becomes cognizable under the Fourteenth Amendment and state termination procedures are not beyond the scrutiny of federal courts. The consistency of state removal procedures with federal Due Process concepts states a cause of action in federal courts. To simply defer to state removal procedures when property interests cognizable under the Fourteenth Amendment are withdrawn, and to fail to test their compliance with Fourteenth Amendment requirements as Judge Foley refused to do, is to effectively eliminate the Due Process guarantee. The net result of the opinion below is that any state procedure for removal of property or liberty interests is "due" and not subject to federal judicial scrutiny regarding its relationship to Due Process concepts. The lower court has simply misread Bishop v. Wood, supra, both as to its facts and the extent of its holding.

The factual and state law differences between Professor Robinson's employment status and that of the police officer in Bishop v. Wood has been noted supra. Professor Robinson is entitled to have the removal procedures of Article VIII, Title C and D and Article IX and those procedures followed in fact by the Trustees, measured against the Fourteenth Amendment Due Process Clause. See plaintiff's complaint ¶14 (a)—(g) at A. 8-10.

> Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, have interests in continued employment that are safeguarded by due process." Board of Regents v. Roth, 408 U.S. 564, 576-577 (1972) (emphasis supplied).

There is no dispute but that Professor Robinson was dismissed during the term of his contract. Indeed this issue, arising on a motion to dismiss, must be accepted as true. Thus, there is no basis in fact or in law which supports Judge Foley's determination that Professor Robinson's complaint fails to state a federal cause of action. Plaintiff's employment contract with the defendants is "property" and the state, through the Board of Trustees, has extinguished his legitimate claim of entitlement to his job. See Bruce v. Bd. of Regents for N.W. Missouri State Univ., 415 F.Supp. 559, 568-569 (W.D.Mo. 1976).

Moreover, the lower court failed to examine the nature of Professor Robinson's employment status under New York law and the Faculty Handbook and Agreement. The court considered Bishop conclusive on the issue. Yet as the district court in Bishop noted in discussing Perry v. Sindermann, 408 U.S. 593, "the Supreme Court . . . held that the plaintiff, a professor with 10 years of service, should not be foreclosed from proving his entitlement

to tenure based upon the rules and understandings officially promulgated and fostered." Bishop v. Wood, 377 F.Supp. at 504. Since the district court believed Bishop to be conclusive on the issue, plaintiff Robinson never received an independent judicial examination of the proprietal status of his employment as did the plaintiff in Bishop.

This court should, at the least, remand the matter to the district court for a determination of the property interest of Professor Robinson under New York law and the terms of his "continuing" contract, or make such a determination itself in accord with Roth, 408 U.S. at 576-577, declaring the Professor's employment status "property" protected by the Due Process Clause. The Fourteenth Amendment and United States Supreme Court decisions thereunder require no less.

B. Findings Have Been Made Regarding Plaintiff's Physical And Mental Ability To Continue Teaching. These Statements And Reports Have Become Part Of Plaintiff's Personnel File At The College And The Defendants Have Admitted That Such Information Will Be Made Available To Any Prospective Employer Of The Plaintiff. Under These Circumstances The Liberty Interest Of Professor Robinson Is Infringed Since He Cannot Defend His Professional And Individual Reputation In A Hearing That Does Not Permit Him To Introduce Medical Reports And Other Documentary Or Testimonial Evidence Attesting To His Mental And Physical Fitness To Teach.

The district court also erred in precluding plaintiff from proving the stigma attached to his discharge, and in its

interpretation of those facts presented in the "hearing" transcript attached to the motion to dismiss.

Of course a refusal to rehire at the end of a term contract is not, per se, evidence of a stigma to one's professional reputation. The fact that an untenured college teacher has not been rehired at the expiration of his contract "might make him somewhat less attractive to other employers," Bishop v. Wood, 96 S.Ct. at 2079, but does not necessarily infringe upon Fourteenth Amendment "liberty" interests. As Roth indicates, the termination must impair the employee's reputation in some particular fashion. In merely failing to rehire someone an employer does not "make any charge against him that might seriously damage his standing and associations in his community." Roth, 408 U.S. at 573; Paul v. Davis, U.S. , 96 S.Ct. 1155, 1164-65 (1976).

But Professor Robinson has not suffered a non-renewal of his contract. Instead, he was fired (or involuntarily retired), during an existing "continuing" contract. The apparent reason was his allegedly deteriorating mental and physical condition, the underlying cause believed to be diabetes with a poor prognosis for recovery. Certainly this is "stigmatizing" information.

And, compounding its error, the lower court erroneously viewed this information as confidentially kept by the college (A. 39). But as the transcript indicates (A. 62), Dr. Eisenhart would publish this stigmatizing information to any prospective employer of Professor Robinson. This would significantly impair the Professor's ability to move within his occupation and would interfere with the practice of his chosen profession. Professor Robinson's "good name, integrity and reputation" as a college professor is at state "because of what the government is doing to him." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Due Process certainly requires that procedures be adequate for Professor Robinson to challenge these factual allusions of the Trustees. Board of Regents v. Roth, 408 U.S. at 573.

This case is remarkably similar to Velger v. Cawley, 525 F.2d 334 (2d Cir. 1975), cert granted, 96 S.Ct. 3188 (1976). As in Velger, plaintiff's employer (Adirondack Community College) would grant ready access to his file. This would have the similar sure effect of closing the teaching profession to Professor Robinson because "serious derogatory information in the file will stigmatize the dischargee." 525 F.2d at 336-37.

It is true that the complaint herein does not specifically allege such a publication, but the complaint is aimed at preventing such a result and, construed liberally, can be read to include such a claim. See plaintiff's complaint, subd. 6 at A. 13.

The district court's reliance on Bishop v. Wood, supra (A.39-40)to foreclose plaintiff's liberty claim is therefore error. A future publication was specifically admitted (A. 62). Professor Robinson is "deprived of his reputation as a person who (is) presumably free from mental disorder." Lombard v. Board of Education of City of New York, 502 F.2d 631, 637 (2d Cir. 1974), cert den. 420 U.S. 976 (1975). "[I]t does grievous harm to (the employee's) chances for further employment . . . and not only in the teaching field." Id.

Lastly, under Fed.R.Civ. P. 15 (b), the complaint could always be amended to conform to evidence of future publication. It was error for the lower court to preclude an opportunity for such proof when, at the same time, it considered other extrinsic facts presented by the transcript attached to the motion to dismiss. See opinion of Foley, J. (A. 38-40).

POINT II

THE DISMISSAL PROCEDURES FOLLOWED IN TERMINATING PROFESSOR ROBINSON AND THOSE ESTABLISHED IN THE FACULTY HANDBOOK ARE CONSTITUTIONALLY INSUFFICIENT IN ACCOMMODATING THE INSTITUTIONAL CONCERNS OF THE TRUSTEES WITH THE PRESENT AND PROSPECTIVE LOSS OF PROFESSOR ROBINSON'S TEACHING CAREER; THE RISK OF ERROR SURROUNDING FACTUAL DETERMINATIONS MADE AT THE SUPPOSED "HEARING" REGARDING PROFESSOR ROBINSON'S PHYSICAL AND MENTAL CONDITION IS HIGH: (1) NO FIRST HAND TESTIMONY WAS PRESENTED; (2) THERE WAS NO OPPORTUNITY TO CALL WITNESSES ON ONE'S OWN BEHALF; (4) THERE WERE NO OATHS ADMINISTERED; (5) THERE WAS NO NOTICE GIVEN AS TO THE NATURE OF THE CHARGES AGAINST PLAINTIFF.

> "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Assuming those facts impermissibly found by the lower court, it is clear that plaintiff did not enjoy the procedural protections which, under the Fourteenth Amendment, must attend the withdrawal of "property" or "liberty" defined by state law or circumstances. (Herein a dismissal of a college professor with 13 years of service and a "continuing contract" created by a collective labor agreement under New York law. See Point I, supra). This is clear whether or not the "fundamental fairness" test of the lower court is employed. See Opinion of Foley, Jr. at A. 40. But plaintiff contends that such a "fundamental fairness" test is insufficient. If used, it must be in conjunction with an

identification of competing interests analysis as well as a balancing of those interests identified. As the Court noted in Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 738-39 (1975):

> "The timing and content of the notice and the nature of the hearing would depend on appropriate accommodation of the competing interests invaded."*

Herein, the competing interests are evident. The employment of a professor with 13 years of service to his college, a continuing contract and the prospect that he will never again practice his profession if his personnel file is left unrefuted and disclosed to future employers, all hang in one balance. In the other hangs the institutional concerns of the defendants who

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* "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Facist Refugee Committee v. McGrath, 341 U.A. 123, 168 (1951) (Frankfurther, J. concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.

Accordingly, . . . 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action' (citation omitted)" Goldberg v. Kelly, 397 U.S. 254, 262-63 [1970].

fear a multitude of trial-type hearings, although situations like the present action seemingly would rarely occur. What this Court must do in accommodating these interests is to ascertain the risk of error present in various forms of hearings and then measure that risk against both the harm or deprivation suffered by the plaintiff if wrongly denied his "benefit" and the burden placed on the institution or governmental agency withdrawing the benefit. Goss v. Lopez, supra.

As to deprivations of property premised on hearsay the Supreme Court has stated:

> "Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." Id., at 739 (Emphasis supplied).

There is little cost and no interference with the educational process if the Trustees are required to notify Professor Robinson of the exact reasons for his termination and produce at the hearing those persons who question his teaching ability for mental, physical or professional reasons. Indeed, the record is bare as to what the plaintiff was told, before the hearing, were the reasons for his termination. The Trustees'

letter subsequent to the "hearing" confirming the termination also contained no specific reasons for the termination. Professor Robinson still does not have the satisfaction of knowing whether he was "fired" for incompetence or "retired" for health reasons. He was denied the benefit of processes that could have provided him with that modicum of satisfaction. But more important, he could not marshall facts in his own defense because he did not know whether he was being fired or involuntarily retired for health reasons.

The lower court noted that the question of physical and mental impairment was alluded to during the hearing. See Opinion of Foley, J. at A.38. But the district court did not make a finding that this was the reason for the termination, perhaps since no official reason for the termination was ever expressed.

Nevertheless, such allusions without an opportunity to present opposing medical testimony, cf. Richardson v. Pernales, 402 U.S. 389, 402 (1971), cannot be the basis for denying a veteran college professor the expectancy of continued employment under his "continuing" contract. And such allusions should not blemish his personnel file and effectively destroy future employment opportunities without giving him a chance to challenge the underlying medical conclusions. At the least he must be permitted

to put his story on the record for future employers to read. Yet all this has been denied to Professor Robinson.

Seemingly, no notion of fundamental fairness could support these one-sided deprivations. Institutional concerns do not r e q u i r e results which run roughshod over individual rights and concerns. The Due Process Clause of the Fourteenth Amendment was designed for plaintiffs like Samuel Robinson.

> "'[F]airness can rarely be obtained by secret, one-sided determination of the facts decisive of rights . . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of a case against him and opportunity to meet it.' (citation omitted)". Goss v. Lopez, supra at 739.

The fact that such notice is required in ten-day school suspension cases certainly signifies that similar and more formal procedures must be applied in cases like this appeal, where the deprivation is so much more severe. See Goss v. Lopez, supra at 740. In fact, the court in Goss noted that:

> "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required." Id., at 741 (emphasis supplied).

It is in this area of confrontation and cross-examination of witnesses and the opportunity "to call his own witnesses to verify his version of the incident", Goss, supra at 740, that the "hearing" allegedly given to plaintiff, and the Faculty Handbook are particularly constitutionally deficient.

> "Rules of procedure may be sharpened by consideration of the risks of error, In Re Winship, 397 U.S. 358, 368 (1970) (Harlan, J., concurring); Arnett v. Kennedy, 416 U.S. at 171 (White, J., concurring in part and dissenting in part), and should also be shaped by the consequences which will follow their adoption." Wolff v. McDonnell, 418 U.S. 539, 567 (1974).

Given the harm resulting to Professor Robinson upon termination for those reasons alluded to by the defendants, the risk of error in making factual determinations must be substantially reduced. Rudimentary procedures do not suffice. Plaintiff believes that confrontation and cross-examination of witnesses are not great burdens to the institution when such witnesses are readily available, i.e., on campus. The institutional concerns which have led the high Court to deny such rights in the prison context, Wolff v. McDonnell, 418 U.S. at 567-574, are absent on the college campus. The Court in Wolff stated:

> "These procedures, (confrontation and cross-examination), are essential in criminal trials where the accused, if found guilty, may be subject to the most serious deprivations, (citation omitted), or where a person may lose his job in society, Greene v. McElroy, 360 U.S. 474, 496-497 (1959)." Id., at 567.

And the Court in Wolff did hold that, as often as feasible, inmates facing disciplinary action "should be allowed to call witnesses and present documentary evidence in (their) defense . . . . Ordinarily, the right to present evidence is basic to a fair hearing; . . . ." Id., at 566. Professor Robinson's accusers may or may not have been identified to him prior to the hearing, but without the opportunity to cross-examine them, or, before the hearing to investigate the events which they would testify to, any subsequent identification of who his accusers were is meaningless.

> "Part of the function of notice is to give the charged party a chance to marshall the facts in his defense and to clarify what the charges are, in fact." Wolff v. McDonnell, supra at 564.

As this Court noted in Lombard, 502 F.2d at 637-38:

> "A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding."

No witnesses were called by the defendants to present testimony, first-hand, as to Professor Robinson's mental condition and teaching ability. Without prior knowledge of who were the complainants against plaintiff, or the opportunity to call one's own

witnesses, the presence of counsel was also meaningless and ineffective. Plaintiff could have done as much for himself as his counsel was permitted to do.

The termination of this plaintiff unquestionably hinges upon the truth or falsity of disputed facts.

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. at 269.

In Thomas v. Ward, 374 F.Supp. 206 (M.D.N.C. 1973), the plaintiff, a teacher in the Winston-Salem/Forsythe School System brought an action against various school officials alleging that those officials had violated his constitutional right to due process by failing to give him a fair hearing with respect to his dismissal. After holding the plaintiff was entitled to a hearing, the court held that the hearing should have complied with minimum due process requirements. In finding the hearing provided had failed to satisfy due process requirements, the court discussed the interests involved in the hearing and the necessary nature of any subsequent proceedings. While it is clear that a school hearing need not approach the level of a criminal trial, the court did state that minimal due process has been defined to include:

> "(1) Adequate notice, (2) a sufficient specification of the charges to permit the showing of error, if any, (3) an opportunity to confront and cross-examine one's accusers, (4) a list of the names and the nature of their testimony of witnesses testifying against him, (5) a hearing before an impartial board with sufficient expertise, where the employee may present evidence in his own defense. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Grimes v. Nottoway County School Board, 462 F.2d 650 (4th Cir. 1972). These procedures at times confer by implication additional safeguards such as: (6) the ritht to have findings based on substantial evidence before a tribunal making written findings. Goldberg v. Kelly, 397 U.S. 254; Allen v. City of Greensboro, 452 F.2d 489 (4th Cir. 1971); Keene v. Rodgers, 316 F.Supp. 217 (D. Ne. 1970); Johnson v. Angle, supra; Ramsey v. Hopkins, 320 F. Supp. 477 (N.D. Ala. 1970), modified on other grounds, 447 F.2d 128 (5th Cir. 1971)." Thomas v. Ward, 374 F.Supp. at 211.

While the court in Thomas found that the adequacy of the hearing must be judged on the particular facts of each case, in that case several of the plaintiff's complaints were found to have merit. For example:

> "Other facets of the hearing leave much to be desired. School Board did not swear in the witnesses. The school system presented no live witness testimony, but relied on affidavits and letters. The lack of sworn testimony, or use of affidavits may be proper in certain situations . . . . Here, however, charges did not involve a simple one fa issue, but a value judgment requiring opinion of professional educators. In order to ascertain the facts relied upon by the school system and to have a chance to test their validity as a basis for formulating an opinion, plaintiff needed the right to confront and cross-examine his accusers . . . . [O]ther persons responsible for influencing the school system's

decision were not there. Cf. Fielder v. Board of Education of School District of Winnebago, Neb., 446 F.Supp. 722, 730 D. Neb. 1972." Id., at 212.

In this action many of the same requirements discussed in Thomas were not provided to plaintiff. See plaintiff's complaint, ¶14(a)-(g) (A. 8-10). For example, the Trustees failed to administer an oath before hearing the "testimony" of witnesses used by the college to justify its termination of Professor Robinson. President Eisenhart and Dean Hibbard related to the Board, without first being sworn, what they considered to be the relevant "facts" which led to the dismissal of Professor Robinson. They spoke exclusively from notes, evaluations and memory about hearsay statements allegedly made with regard to Professor Bosinson by faculty members, students and physicians. However, at no time did they produce these witnesses to substantiate the truth of the statements attributed to them. How could plaintiff, a career professional at the college, hope to successfully oppose his dismissal when he never was informed of who would "testify" against him at the "hearing" or what would be the documentary and hearsay evidence used against him?

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination." Greene v. McElroy, 360 U.S. at 496.

The Fourth Circuit affirmed the district court opinion in Thomas v. Ward, supra. In assaying the due process requirements and terminations of long-term professors, it was aware of the institutional concerns of educational administrators. See Thomas v. Ward, 529 F.2d 916, 919-930 (4th Cir. 1976):

> "The Board, however, does complain of the administrative burden that would result from a requirement that it provide a full hearing to each teacher it discharges. Such considerations are properly the subject of concern, of course, but they cannot always outweigh the employee's interest in having an effective opportunity to challenge damning evidence and in preserving his job and reputation."

But, as noted supra, these concerns are minimal when balanced against the weighty personal interests of the plaintiff in retaining not just this job, but any hope of future

employment in his chosen profession; and when measured against the risk of error by the Trustees in deciding plaintiff's mental and physical competence in a hearing that offered plaintiff no opportunity to present contrary medical opinion,* the concerns of the Trustees are minimal indeed.

It was this process of identification of interests and measuring the risk of error in resolving the particular factual disputes surrounding Professor Robinson's termination, along with its general examination of the fundamental fairness of the termination procedures, which is found wanting in the lower court's opinion. As presently constituted, that decision cannot stand.

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* Whether such an opportunity existed is a fact in dispute. The district court considered only the transcript supplied by the Trustees without informing plaintiff. See Point II supra. Professor Robinson was never given a chance to show the district court that an opportunity for presenting his own expert medical evidence at the "hearing" was in fact unavailable.

POINT III

IN DISMISSING PLAINTIFF'S COMPLAINT ON A 12(b)(6) MOTION THE LOWER COURT CONSIDERED FACTUAL MATERIAL OUTSIDE OF THE PLEADINGS WITHOUT NOTICE THEREOF TO THE PLAINTIFF AND IT DID NOT PROVIDE AN OPPORTUNITY FOR THE PLAINTIFF TO SUBMIT FACTUAL MATERIAL IN SUPPORT OF HIS POSITION UNDER FED.R. CIV.P. 12 (b). FURTHERMORE, ENTRY OF SUMMARY JUDGMENT UPON THE MOTION TO DISMISS WAS IMPROPER BECAUSE GENUINE ISSUES OF FACT EXISTED AS TO THE SUFFICIENCY OF THE HEARING GIVEN PLAINTIFF.

Attached to the Trustees' motion to dismiss was a transcript of a "hearing" which supposedly satisfies Professor Robinson's due process rights. Undoubtedly the lower court considered this material in dismissing plaintiff's complaint (See Opinion, Foley, J. at A. 37-39.) Plaintiff admits that such material outside of his pleading may be considered upon a 12(b)(6) motion, but only when the additional conditions established by Fed.R.Civ.P. 12(b) are satisfied. More specifically, Rule 12(b) provides that if, upon a 12(b)(6) motion:

> "Matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

These requirements were not satisfied by the district court. At argument before Judge Foley plaintiff objected to the court's consideration of the attached transcript. At argument and in a letter to the lower court after the motion was heard, plaintiff requested an opportunity to present evidence in support of the complaint (A. 28). Plaintiff was never notified by the lower court that it would indeed examine the transcript and consider defendants' motion as one for summary judgment. Plaintiff therefore was deprived of an opportunity to contest the facts and circumstances surrounding his "hearing" and dismissal. Those facts found in the opinion of the lower court regarding this "hearing" and the legal conclusions drawn therefrom are necessarily suspect. They represent proof by only one party to this action; plaintiff has had no opportunity to contest by affidavits, document or testimony the sufficiency of the "hearing" given him.

Furthermore, the test appropriate for granting a summary judgment under Fed.R. Civ.P. 56 was not applied. There is a genuine issue of material fact as to whether Professor Robinson had sufficient notice of the exact nature of the charges against him, or whether he was permitted or specifically refused permission to call witnesses on his own behalf, including medical experts.

It further appears there are material issues of fact over Professor Robinson's opportunity to confront those people who complained of his alleged lack of ability and whether the defendants would disclose to prospective employers the medical and professional information in Professor Robinson's personnel file.

In sum, there are real factual questions as to the procedural opportunities that may or may not have been available to Professor Robinson. The lower court either improperly ignored these questions, or resolved them unfavorably as to the plaintiff without giving notice that it intended to make findings of fact. As this Court noted in Dale v. Hahn, 440 F.2d 633, 638 (2d Cir. 1971):

> "While Rule 12(b), F.R.Civ.P., provides that a motion under Rule 12(b)(6) may be treated as a motion for summary judgment under Rule 56, it also provides that 'all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' It seems fair to include within the term 'reasonable opportunity' some indication by the Court to 'all parties' that it is treating the 12(b)(6) motion as a motion for summary judgment. Costen v. Pauline's Sportswear, Inc., 391 F.2d 81, 85 & n.5 (9th Cir. 1968); 2A Moore, Fed. Practice, ¶12.09 at 2300-02 & nn. 23 & 25. Here, the district judge gave no indication that he was going to consider anything but the pleadings, plaintiff filed no counter-affidavit, and the factual issue of whether she received notice was resolved against her on defendants' affidavits alone. This was error."

And, inasmuch as the transcript was attached to the motion, it was no more a part of the pleadings than the motion itself. Cf. 3 Moore, Fed. Practice, ¶15.07[2] at 851-52.

The opinion of the district court must be reversed. Findings of fact as to the sufficiency of any hearing given plaintiff may then be made, but only after all parties have had an opportunity to present proof on that issue.

CONCLUSION

WHEREFORE, plaintiff requests this Court to: (1) reverse the determination of the district court that the "hearing" given plaintiff was constitutionally sufficient given the interests at stake; (2) reverse the determination of the district court that no "property" or "liberty" interests protected by the Fourteenth Amendment are held by plaintiff; and, (3) deny the motion to dismiss and order the defendant to file an answer.

Respectfully submitted,

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STATEMENT OF SERVICE

STATE OF NEW YORK:
COUNTY OF ERIE : ss.
CITY OF BUFFALO :

JUDITH M. TUNNEY, being duly sworn deposes and says deponent is not a party to the action, is over 18 years of age and resides at One Niagara Square, Buffalo, New York. On September 9, 1976 deponent served the within joint appendix and brief upon Jed D. Wolkenbreit, Esq., attorney for the Defendants-Appellees at 90 State Street, Albany, New York 12207, the address designated by said attorney for that purpose by depositing two copies of each in a post-paid, properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

Judith M. Tunney

Judith M. Tunney

Sworn to before me this
9th day of September, 1976

Cheryl A. Hoople

CHERYL A. HOOPLE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977